Supreme Court of the United States

October Term, 1919

No. 142

THE CUYAHOGA RIVER POWER COMPANY
Appellant

against

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY and THE NORTHERN OHIO POWER COMPANY
Appellees

APPELLANT'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM—1919

THE CUYAHOGA RIVER POWER COMPANY, Appellant, against THE NORTHERN OHIO TRACTION AND LIGHT COMPANY and THE NORTHERN OHIO POWER COMPANY, Appellees.	No. 102.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

APPELLANT'S REPLY BRIEF

The appellees have filed a brief and also a supplemental brief. The former contains their principal contentions, and our references, unless otherwise noted, are to it and not to the supplemental brief.

I

The question of jurisdiction suggested at page 18 of the Supplemental Brief, is definitely disposed of by *Cuyahoga River Power Co. v. Akron,*

240 U. S., 462. True, the defendants here are not *municipal* corporations, but that is immaterial.

> *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650;
> *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674;
> *St. Tammany's Waterworks v. New Orleans Water Works*, 120 U. S. 64.

Each of those cases arose upon a bill in equity in the Federal Court to enjoin the invasion of a franchise.* In two of them the defendant was a purely private corporation (*i. e.*, not a municipal corporation) and in the other the defendant was *an individual.* In each case the parties on both sides were citizens of the same state (Louisiana), and in each case an injunction was awarded because the defendants, acting under color of State laws, were taking steps that interfered with the plaintiffs' franchises.

See, also, page 58 of our first brief.

II

The appellees concede the general doctrine that priority of location gives priority of right as against rival companies (Brief, p. 18; Supp. Brief, pp. 14, 15).

They say this "would not seem to be the law in Ohio" and refer, pages 18, 19, to the opinion of Mr. Justice CLARKE, as District Judge, in *Sears v. Akron.* We dealt with that opinion at pages 25 to 46 of our first brief and, as we respectfully submit, demonstrated that the doctrine *does* and *must* prevail in Ohio, *and, also, that it*

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* The case first cited was originally brought in a State court, but it was then removed to the Federal Court upon the ground that it was a case arising under the Constitution of the United States (115 U. S., 651).

has been expressly recognized in that State. As to the latter proposition see page 22 of our first brief. The appellees have not answered our argument. Further discussion upon that point thus seems unnecessary, except to point out that the Ohio statute giving condemning corporations the right to abandon an appropriation proceeding (*Code,* §11060, cited by the Court below and quoted at page 21 of the appellees' brief) has not been construed in Ohio as authorizing either a change of a location once adopted or an abandonment of the enterprise. See pages 34-41, 42-46 of our first brief, and *Adena R. R. Co. v. Public Service Commission,* 92 Ohio St. 1, *Hocking Valley Ry. Co. v. Public Utilities Commission,* 92 Ohio St. 9, *Kanawha & M. Ry. Co. v. Public Utilities Commission,* 96 Ohio St. 414, 429. In those cases the Supreme Court of Ohio expressly held that by incorporation under the general laws of that State a public service corporation assumes an obligation to perform duties for the benefit of the public and cannot absolve itself from that obligation, and that the State has the right to compel the corporation to perform them. See *infra,* pages 30-32.

III

The real ground of the appellees' argument is that the doctrine that priority of location gives priority of right is limited to cases between *rival companies* and has no application to the case at at bar *because the defendants here are holding the land "in a purely private capacity"* (Brief, p. 22; and paragraphs 4 and 6 at pp. 15, 16 of Supp. Brief).

That contention is based solely and exclusively upon the averment in paragraph Sixteenth of the bill that the defendant Traction Company has no corporate authority or franchise to exercise the power of eminent domain for the purpose of acquiring power houses or the lands necessary therefor, and that the Traction Company's use of the land is *a private use and not a public use* (Rec., p. 9). The appellees say that that is an averment of *fact,* admitted by the motion to dismiss and binding upon the plaintiff, and from it they draw the inference that this is a suit, not between rival public utility corporations, but a suit by one public utility corporation against a private owner.

That position, we submit, is a naked refusal to discuss the case made by the bill because it pays no attention to the other allegations.

Inasmuch as the question whether a use is public or private is a judicial question upon which this Court can even reverse the State Courts (*O'Neill v. Leamer,* 239 U. S. 244, 249; *Union Lime Co. v. Chicago, &c. Co.,* 233 U. S. 211, 218), it seems quite plain that the averment in the bill that the use of the Traction Company is a private use is a conclusion of law and not the averment

of a fact, and the bill emphatically shows that both the appellees were organized as public utility corporations and that the Traction Company is operating as such. Aside from that, however, the bill shows that, although the Traction Company itself had no power of eminent domain (and hence, according to the views of the pleader, its use was private and not public), it has acquired, by virtue of orders of the Public Utilities Commission, the rights and franchises of the Northern Ohio Power Company, which was incorporated under the statute under which the plaintiff was organized and obviously did have the power of eminent domain. If the organization of the Northern Ohio Power Company and the transfer of its property and franchises to the Traction Company be valid, then the Traction Company's own lack of the power of eminent domain is supplied by its possession of the franchises of the Northern Ohio Power Company and the use is public; and *the allegation in paragraph Sixteenth of the bill that the Traction Company's use was private is based upon the other allegations of the bill that the organization of the Northern Ohio Power Company and the transfer of its franchises to the Traction Company are null and void as to the plaintiff.* That, certainly, is what the pleader meant, and it is, we submit, the reasonable intendment of the bill; and it is not permissible for the appellees to pick out the one allegation of private use and ignore the other allegations which show its meaning.

Every bill to enjoin any invasion of any right necessarily avers that the defendant is acting contrary to or in excess of its rights, and it is because the defendant persists in doing what it has no right to do that the injunction is sought. So,

in this case, the bill properly shows that the defendants have "no rights in the property other than those of a private owner" (Appellees' Brief, p. 23), and it is the fact that they are *asserting and exercising other rights* (*i. e.*, the purported powers and franchises of the Northern Ohio Power Company) which is the occasion for this suit. See page 68 of our first brief.

The appellees contend that the averments that the Traction Company claims and asserts that the property has been devoted by it to a public use and therefore cannot be taken from it by the plaintiff "amount to nothing in the face of the plain allegations of the bill that the Traction Company has no right of eminent domain as respects the land in question and that its use thereof is entirely private" (Brief, pp. 22, 23). If the bill rested upon a *mere verbal assertion* of such a claim on the part of the Traction Company, unsupported by any color of State authority and without any action being taken upon the basis of that assertion, the contention might have some merit. But attention must be paid to the other allegations of the bill. The Traction Company not only makes that oral assertion but it also acts upon that assertion by building power houses and generating electricity and pleading its alleged devotion of the lands to a public use as a bar to plaintiff's appropriation of the land, and as color of authority for its claims it has the apparently valid charter of the Northern Ohio Power Company and the apparently valid orders of the Public Service Commission set forth in the bill. Under such circumstances, the fact that that charter and those orders do not actually authorize its acts and assertions and that, on the contrary, its acts and assertions are wholly wrongful, does not de-

feat the plaintiff's right to relief. See, *Home Tel. & Tel. Co. v. Los Angeles,* 227 U. S. 278, and *Cuyahoga River Power Co. v. Akron,* 240 U. S. 462.

In their brief in this Court the appellees become exceedingly magnanimous—asserting that they are simply private owners like John Smith (p. 23), that they have no broader or better right to the land than such as would be acquired by an ordinary deed from any private owner (p. 44), that they hold their title "subject to and at the hazard of all the rights acquired by the plaintiff" (p. 45), that their use does not affect the plaintiff's right to acquire the land (p. 28), and that when the plaintiff completes a condemnation proceeding "they must retire and lose the benefit of all the construction (they) have placed thereon at (their) own hazard (p. 45). And they close with what amounts to a challenge to the plaintiff to go ahead and condemn the land (p. 47). To the same effect is paragraph 4 at page 15 of their Supplemental Brief.

But in other cases and outside the portals of this Court the attitude of the appellees is quite different. We know from the opinion of this Court in *Cuyahoga River Power Co. v. Northern Realty Co.,* 244 U. S. 300, as well as from the bill in this case, that when the plaintiff sought to condemn the land the Traction Company "resisted the taking on the ground that a condemnation of the land under the petition of the (plaintiff) would be inconsistent with and destructive of the public use to which the land had been applied by the Traction Company" (pp. 301, 302). And the plaintiff knows full well that if it should accept the challenge thrown down in the concluding paragraph of the appellees' brief, it would be met

with the same claim again. The plaintiff does not fear that "the facts claimed by it are not true" or that "its legal theories are untenable." On the contrary, having failed, in the case just cited, to obtain a decision of this Court as to the validity of the Traction Company's claim of devotion to public use as a bar to the plaintiff's right to condemn the property, because the State Court made its decision in such ambiguous form as to make it impossible for this Court to tell upon what ground the decision of the State Court was based, the plaintiff now comes to this Court again for the purpose of obtaining its decision upon that precise point.

We make no secret of the fact that after the rendition of the decision of the State Court in condemnation case the present suit was commenced because of a fear that this Court might do precisely what it subsequently did do in *Cuyahoga River Power Co. v. Northern Realty Co., supra, i. e.,* dismiss the writ of error because the record made it "impossible to say" what the State Court had decided. Surely it was very right and proper for the plaintiff, in view of the fact that the State Court had dismissed its condemnation proceeding without giving any reason for its action and had thus deprived this Court of jurisdiction to review that case, to assert its constitutional rights by means of a bill in equity in the courts established for the very purpose of determining constitutional controversies. *

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*This court's "stinted jurisdiction" on writs of error to State Courts seems to have led Webster, at Mr. Justice Story's suggestion, to adopt a similar policy in the Dartmouth College Controversy. See Beveridge, Life of John Marshall, Vol. IV pp. 251, 252.

As pointed out at page 81 of our first brief, if the plaintiff should commence another condemnation suit the State Court might do precisely the same thing it did in the first suit. *It is for this reason that before commencing such second suit the plaintiff desires to enjoin the appellees from asserting that they have devoted the property to a public use and thereby defeated the plaintiff's right to condemn it.* When armed with such an injunction, the plaintiff will be enabled to go into the State Court and prove (a) its corporate existence, (b) its right to make the appropriation, (3) its inability to agree as to the compensation to be paid, and (d) the necessity for the appropriation (Ohio Code, §§11039, 11046), without the danger of having to submit to the judgment of the State Court upon constitutional questions which it is the pre-eminent function of this Court to determine.

We ask the Court to keep in mind the practical situation with which the plaintiff is confronted. Having adopted a plan locating its proposed improvement upon specifically described parcels of land, it proceeded to condemn those lands. As to the "keystones," so to speak, it was met with the claim that a subsequent sale of the land to public utility corporations and their use of the land for power-development purposes had defeated its right to acquire them. That claim presented the question whether the plaintiff had a property right in its perfected location which could constitutionally be taken away from it by such subsequent sale to a rival corporation. Such question was undoubtedly involved in the condemnation proceeding which the plaintiff had instituted. The State Court, however, rendered its decision in a form which, this Court has said, *makes*

it impossible to tell whether that question was decided or not (244 U. S. 300, 304). Confronted with that form of decision by the State Court, and fearing that this Court might (as it subsequently did) decline to review the case because of the ambiguity in the State Court's decision, the plaintiff sued in the Federal Court to enjoin the public utility corporations which had thus purchased the land from asserting that their alleged devotion of the land to a public use is a bar to the plaintiff's right to condemn. Such suit again presents the question above stated, as to whether the plaintiff has a property right in its perfected location which can constitutionally be taken away from it by such subsequent sale to a rival corporation. That question we now ask this Court to determine in order that the plaintiff may be free to prosecute a condemnation proceeding in the State Court without there being interjected into the case this federal question as to whether the plaintiff's right to condemn the land is barred by the subsequent purchase of the land by the appellees and their alleged devotion of it to a public use.

No one can say that that federal question has been decided adversely to the plaintiff, nor can any one say which, *if any*, of the four "preliminary questions" involved in the first condemnation proceeding have been decided adversely to it (*Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300). And in view of that fact, the entire question is open for decision.

It is true that in their Supplemental Brief the appellees, upon the authority of the decision in the prior condemnation proceeding, urge that the plaintiff's right of condemnation has been denied by a Court of competent jurisdiction (Supp.

Brief, pp. 2, 15) or at least has been made so doubtful that a Court of Equity will not protect it (par. 3 at p. 15). But the same counsel who now makes this assertion there argued, strenuously and successfully, that the record in that case left it in doubt what point had been there passed upon. Upon that argument he secured a dismissel of the case by this Court for want of jurisdiction. Certainly he cannot now be heard to assert that the decision in that case constitutes an adjudication against any right now claimed by the plaintiff. And whether he asserts it or not, it is clearly demonstrated to be untrue by this Court's own statement that it is *impossible to say* what was decided in that case.

What we have already said is sufficient, too, to show that we are not endeavoring to make the present suit a *substitute* for a condemnation proceeding and are *not* endeavoring to acquire the land in question through a receiver, as repeatedly suggested by the appellees.

IV

Pages 24 to 36 of the appellees' brief, as we understand them, assert these propositions:

(1) The appellees' use of the land is not an actual present interference with or invasion of any right or franchise of the plaintiff, and hence the only possible theory upon which the bill can be sustained is that the appellees' assertions as to the character of their use justify a suit to quiet title. See, particularly, pages 25 and 30.

(2) The bill cannot be sustained as a suit to quiet *title to land* because such a suit can be brought "only by one in possession and being

either the owner of lands or having some actual interest therein," and in this case the plaintiff has neither the title to nor the possession or right of possession of the land. See page 26.

(3) The bill cannot be sustained as a suit to quiet *title to the plaintiff's franchise rights* because (a) such a suit would be an anomaly, (b) "no one is now interfering with the exercise of the franchise," (c) a mere adjudication of the validity of the plaintiff's franchise would be nothing more than the decision of a moot or academic question, (d) the bill seeks to do more than merely quiet title. See pages 33 and 36.

We answer the propositions seriatim:

As to (1): The assertion that the appellees' use of the land is not an actual present interference with or invasion of any right or franchise of the plaintiff, repeated *ad nauseam* throughout the appellees' brief, is but an idle formula of words based upon the wholly unwarranted meaning attributed to the averment of "private use" found in paragraph Sixteenth of the bill. The inescapable fact is that the Northern Ohio Power Company obtained a franchise similar to the plaintiff's *and with a conflicting location,* and the Traction Company bought it and is now using it. Common sense, as well as authority, tells us that this actual present exercise of this rival franchise within the express limits of the plaintiff's location is an actual present interference with the plaintiff's franchise. It is so recognized in all the cases asserting the priority of location doctrine. See, particularly, *Denver & Rio Grande R. R. Co. v. Arizona & Colorado R. R. Co.,* 233 U. S. 601, and the *Rochester Railroad* case cited at pages 17 and 61 of our first brief. See, also pages 52-54 of our first brief.

It is, in fact, *a taking* of the plaintiff's property right in its perfected location by an unlawful exercise of the power of eminent domain (See *infra,* pages 21-27), and thus constitutes, in itself, "an independent head of equity jurisdiction": and "injunction, in this class of cases, is a matter of strict right, not of equitable discretion."

> *Pomeroy, Equitable Remedies,* Sec. 465 (1919 Edition, Sec. 1879);
> *Lewis, Eminent Domain,* 3d, Ed., Secs. 901, 902.

See, also, last paragraph on page 57 our first brief and cases there cited.

The appellees themselves distinctly admit this at page 27 of their brief, where they say:

> "So in the cases of wrongful taking or appropriation of lands by a railroad company or other corporation from an owner, the existence of legal remedies by way of a suit for damages or a suit to compel appropriation *will not preclude the owner from resorting to equity to enjoin such wrongful invasion.*"

The same rule must apply to franchise rights as well as to lands, and if, as we shall demonstrate at pages 21-27, *infra,* the appellee's acts constitute a wrongful taking of the plaintiff's property right in its perfected location, it necessarily follows, even upon the appellee's own admission, that the plaintiff's right to equitable relief is clear.

As to (2): The rule that a suit to remove a cloud or to quiet title can be maintained only by one in possession is not inflexible. It is not itself a principle of equity jurisdiction but merely an application of the principle that equity will not ordi-

narily interfere where there is an adequate remedy at law, and it is stated as a "rule" simply because one out of possession of land generally has an adequate remedy by ejectment (*Pomeroy Equitable Remedies,* Sec. 728, 1919 Ed. Sec. 2150; *Lancaster v. Kathleen Oil Co.,* 241 U. S. 551, 554, 555. See pages 68 to 71 of our first brief.) When the legal remedy is not available, the suit may be brought in equity even by one out of possession (*Lancaster v. Kathleen Oil Co., supra,* at page 555).

Furthermore, while the plaintiff is not in possession of the *land* and has no "title" thereto in the sense in which that word is used in real estate conveyancing, it certainly has "some actual interest therein" by reason of its right to acquire it and use it in its enterprise. Certainly, too, the plaintiff is "in possession" of that interest, and it is its title to *that interest* from which the plaintiff seeks to remove a cloud.

As to (3): (a) No reason is suggested why a suit to quiet title to a franchise or remove a cloud therefrom is any more anomalous than a suit to remove a cloud or quiet title to land. Franchises are real estate, being a class of incorporeal hereditament (2 *Washburn, Real Property,* 5 ed. p. 303; *Joyce, Franchises,* Sec. 26). But even if they were not, they certainly are *property,* and there is no reason why title to any kind of property should not be quieted or a cloud removed therefrom by suit in equity (*Pomeroy, Equitable Remedies,* Sec. 729, 1919 Edition Sec. 2151; *Voss v. Murray,* 50 Ohio St. 19, 28; *Thompson v. Emmett Irr. Dist.,* 227 Fed. 560, 564, C. C. A. 9th Circuit).

(b) We have shown already that the appellees are now actually interfering with the plaintiff's

franchise, both from a practical standpoint and in contemplation of law. See (1) above and pages 52, 53, 61-68 of our first brief.

(c) Even if the relief to be afforded in this case can extend no further than to enjoin the appellees from asserting that their alleged devotion of the land in question to a public use defeats the plaintiff's right to condemn it, the case is certainly neither moot nor academic. The controversy between the parties is very real and genuine, and important property rights depend upon the determination. The situation is not different from that presented in the *Rochester Railroad case* cited at pages 17 and 61 of our first brief, nor from that presented in the *Denver & Rio Grande case* in this court (233 U. S. 601). In each of those cases the plaintiff had merely a located route and was under the necessity of condemning the land before it could take possession. In each of them the defendant had acquired the title and taken possession. Yet in each case the right to an injunction was sustained.

(d) Even if it were true that the bill asks for more relief than can be granted in this case, manifestly that is no reason for dismissing the bill or refusing to grant that portion of the relief to which the plaintiff is entitled.

In short, the propositions urged by the appellees here are the precise duplicate of the contentions pressed upon the Court in the *Denver & Rio Grande case*. At pages 61 to 66 of our first brief we have taken pains to show this by quotations from the record and briefs in that case. In that case, as in this, it was contended that there was an adequate remedy under the condemnation statute, the contention being stated substantially

in the language of the appellees here. See, particularly quotations at pages 64 and 65 of our first brief. Yet this Court, in that case, affirmed a decree awarding an injunction. It expressly stated that the plaintiff was *not* to be

> "remitted to legal or statutory remedies that *rightly are thought to be inadequate* by the local Court."

In their briefs here the appellees do not mention that decision of this Court. No attempt is made to distinguish that case from this. No possible difference between the two cases is suggested; and we think it not too much to say that the appellees' failure to mention that case in their briefs is an admission that that decision is controlling here.

V

At page 29 of their brief the appellees interject this rather unique argument: In *Sears v. Akron,* 246 U. S. 242, the bill alleged that the acts of the City of Akron made it impossible for the plaintiff to carry on its interprise; the City's acts were upheld in that case and the bill dismissed, and hence the plaintiff cannot go ahead with its enterprise: therefore, nothing that the appellees in this case are doing can really hurt the plaintiff.

The same idea is suggested in paragraph 2 at page 15 of their Supplemental Brief as a reason why the bill in this case should be dismissed.

Waiving the question whether the appellees could establish a right to proceed with their own wrongdoing by saying that some other wrongdoer has already dealt a deathblow to the plaintiff, we make this answer to the argument: The

allegations of the bill in *Sears v. Akron* were based upon the fact that the City's ordinance declared that the City thereby appropriated *all the waters of the Cuyahoga River* above a certain point. If the City should actually take what its ordinance said it would take, the plaintiff's enterprise unquestionably would be destroyed, and one of the points urged in that case was that the City was taking ten times as much water as it can legitimately use (246 U. S. 251). Thus far the City has not taken anywhere near the quantity its ordinance stated it was going to take, and in view of that fact the plaintiff is taking comfort in the suggestion thrown out in the opinion of this Court, at page 253, that it may prove that the City's diversion will not be such as will substantially affect the plaintiff's use. Of course, every drop of water which the City diverts lessens the amount available for the plaintiff and actually, presently, and permanently lessens the value of the plaintiff's enterprise by just that much, and it was because of that fact that the plaintiff conceived itself entitled to enjoin the City's diversion. But the fact that this Court has decreed in that case that the plaintiff must suffer a partial loss does not justify the appellees in inflicting upon the plaintiff a further and greater injury.

VI

It seems to us, from pages 36 to 38 of their brief, that the appellees have genuinely misunderstood our contention (our Brief, pp. 55 and 78) that even if a condemnation proceeding be an adequate remedy it does not prevent resort to a federal court of equity because such remedy is

available only in a State Court. We consequently desire to restate our position.

It is of course manifest that the mere fact that a legal remedy is available only in a State Court because the requisites of federal jurisdiction are lacking is not itself a basis of federal jurisdiction. To assert the contrary would be equivalent to saying that the lack of federal jurisdiction is a justification for its exercise. But where, as here, federal jurisdiction exists because of the presence of a federal question, and the point to be decided is whether the subject-matter of that federal jurisdiction is cognizable in equity because of the inadequacy of legal remedies, the fact that there is a legal remedy that *by its very nature* is available only in a State Court is not to be taken into consideration. Under such circumstances, the point is to be decided precisely as if the legal remedy in the State Court did not exist. And that is but another way of saying that a party entitled to sue in the federal courts because a federal question is involved (or because the controversy is between citizens of different States) is not to be denied access to the federal courts simply because the State has provided a legal remedy in its own tribunals.

In other words, the inadequacy of legal remedies is itself a ground for equitable relief (*Pomeroy, Equity Jurisdiction,* 4 ed., 1918, Sec. 217). And in determining in any given case whether or not there is that lack of legal remedies which affords a basis for the interposition of equity, the federal courts inquire what legal remedies exist which, given the ordinary essentials of federal jurisdiction, can be availed of in a federal court. If they find that the only legal remedy is one which can not be asserted in a federal court

even though the ordinary essentials of federal jurisdiction exist, *e. g.* even though the controversy be one involving a federal question or is one between citizens of different states, they refuse to withhold the relief accorded by the principles of equity.

These, it seems to us, are indisputably the views expressed in the cases cited at pages 78 and 79 of our first brief. The same view, it seems to us, is necessarily involved in Equity Rule 22*, for otherwise it would be impossible to comply with the rule in many cases. A federal court in which a suit had been commenced in equity which should have been brought at law obviously could not transfer the suit to a State Court.

VII

At pages 38 to 43 of their brief, the appellees seek to show that the plaintiff's right to equitable relief is barred by *laches*. There seems to have been a studied effort to avoid giving that label to the contention, but that is what it amounts to, and it is so designated in paragraph 7 at page 17 of the Supplemental Brief, where the contention is reiterated. The assertion is that, even assuming that the plaintiff might have enjoined the construction of the power plants in 1911 when their construction was commenced, it cannot have equitable relief under a bill filed in 1916 because it "stood by" and saw these improvements go forward.

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*Equity Rule 22: "If at any time it appear that a suit commenced in equity should have been brought on the law side of the Court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

The conclusive answer to this contention is found in the recent decision of this Court in *Southern Pacific Co. v. Bogert,* 250 U. S. 483, in which this Court reiterated the rule that *laches* is not merely lapse of time, and that to constitute laches it is essential that there be also "acquiescence in the alleged wrong or lack of diligence in seeking a remedy" (pp. 488, 489). In that case 22 years elapsed between the commission of the wrong complained of and the commencement of the suit in which a recovery was sustained. In the *interim,* there had been "rare pertinacity" in the "diligent pursuit of remedy" and despite the fact that the appropriate remedy was well known it was held that this long continued failure to discover it did not to constitute laches.

In the case at bar, there can be no pretense of any acquiescence on the part of the plaintiff or of any lack of diligence in seeking a remedy. On the contrary, the plaintiff was actively asserting its right to the land in question and seeking to acquire it at the very time the defendant Northern Ohio Power Company was organized and at the time that it and its co-defendant the Traction Company purchased the lands and commenced the erection of the power plants. Those steps, *viz.,* the organization of the Northern Ohio Power Company, the purchase of the land, and the erection of the power plants, were all taken *with notice and actual knowledge of the plaintiff's rights and during the pendency of the condemnation proceeding by which the plaintiff was seeking to acquire the land*—a proceeding which the appellees now gravely argue is adequate and exclusive (See, particularly, Bill par. 13, Rec. p. 6).

In view of these facts, expressly admitted by the motion to dismiss, it is the quintessence of

irony to say that the plaintiff has "stood by" or nas acquiesced in the defendant's doings or has lost any rights by so-called *laches*. The fact that the condemnation proceeding has proved inadequate and unavailing and this suit was not brought until the decision of the highest State Court in the prior suit rendered it probable that it would be unavailing, is clearly immaterial in view of the decision of this Court in *Southern Pacific Co. v. Bogert, supra.*

The appellees bought and built during the pendency of the plaintiff's proceedings to acquire the land and with notice of all the plaintiff's rights and claims, and hence to their charge of laches on the part of the plaintiff we answer in the language of Mr. Justice Holmes in *Denver & Rio Grande R. R. v. Arizona & Colorado R. R.*, 233 U. S. 601, 604.

> "The defendant has gone ahead since the suit was begun, but of course has acquired no new rights by doing so."

VIII

We said at page 13, *ante*, that the appellees' exercise of a rival franchise within the express limits of the plaintiff's location is a *taking* of the plaintiff's property right in that location by an unlawful exercise of the power of eminent domain. In order not to interrupt the continuity of the argument in the course of which that statement was made, we did not then stop to demonstrate the point. We hence return to the subject here.

If the appelles had acquired their title to the land by condemnation rather than by contract,

the true character of their alleged devotion of it to a public use as *an exertion of the legislative power of eminent domain* would have been clearly apparent. The circumstance that it happened to be unnecessary for them to resort to an adversary proceeding against a hostile owner in order to acquire title to the soil does not change the character of their act, and cannot obliterate the fact that their act is, inherently and essentially, an exercise of that legislative power.

If the land, in the condition it stood at the time the plaintiff's location was made, were subject to the plaintiff's right to acquire it—if the plaintiff then possessed a *right* to acquire it—then any act which defeats or even substantially interferes with that *right* is a "taking" of the plaintiff's property, *i. e.*, a "taking" of that *right*.

Callen v. Electric Light Co., 66 Ohio St. 166, 177;
Mansfield v. Balliett, 65 Ohio St. 451, 464, 476;
Pumpelly v. Green Bay Co., 13 Wall., 166, 177;
Lewis, Eminent Domain, §§63, 64, 65.

It is, moreover, a fundamental principle that the devotion of property to a public use is a governmental function, a prerogative of sovereignty, and can be accomplished only by the State or some instrumentality of the State exercising delegated legislative authority. It is, in short, an exercise of the legislative power of eminent domain even though the corporation making the devotion be able to acquire the title of the private owner by contract or agreement without the necessity of a formal appropriation proceeding.

This has been squarely ruled by the Supreme

Court of Ohio in two cases in which the devotion to railroad uses of lands *purchased* by railroad companies was held to be an exercise of the power of eminent domain.

> *Doan v. Cleveland Short Line Ry. Co.*, 92 Ohio St. 461, 112 N. E. 505;
> *Ward v. Cleveland Ry. Co.*, 92 Ohio St. 471; 112 N. E. 507.

In each of those cases the plaintiffs were owners of certain lots which had been laid out upon a uniform plan and sold with the restriction that they should be used exclusively for residence purposes. The defendants had *purchased* certain other of the lots with knowledge of these restrictions, but, in disregard thereof, were proceeding to use them for railroad purposes. In each case the plaintiffs urged that such use by the defendants of its own lots constituted a violation of the restrictions. In the opinion in the *Doan case* the courts stated that such restrictive covenants are recognized and given full force and effect between private owners of lots and that such private owners could be enjoined from using the lots for other purposes. But it then said:

> "The case at bar, however, is one at law, in which plaintiff seeks to recover compensation by way of damages resulting from the taking of an alleged property right which she claims to have had in the lots of the defendant, a railroad company organized under the laws of the State and *possessing the right of eminent domain.* It is *the owner of a number of lots* in the allotment and at the time of the commencement of this action was building a railroad on and over *its property.* IT WAS DEVOTING THESE LOTS TO A PUBLIC USE. If plaintiff is entitled to compensation by way of dam-

ages by reason of the use of this property by the railroad company, a right must grow out of the covenant in the deeds of the allotter and the general plan adopted which restrict the use of the property to residence purposes. If such restriction is not to be construed as preventing the use of the property for public purposes, then, of course, there is no violation on the part of the defendant, and it follows that no recovery can be had. If, on the other hand, it is to be construed as prohibiting the use of the property for any purpose other than that of residences, it would prevent a public use of the lots *and thereby defeat the* RIGHT OF EMINENT DOMAIN. No covenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to *prevent the State, or any body, politic or corporate, having the authority to exercise the right of eminent domain from devoting such property to a public use.* The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void.

* * * * *

"We are constrained to the conclusion that restrictive covenants in deeds or a general plan for the improvement of an allotment cannot be construed to *prevent the use of the lots for public purposes, and as against the State or any of its agencies which are vested with the right of eminent domain are illegal and void, confer no property right and cannot be the basis of a claim for damages.*"

And in the *Ward case* it was said:

"It appears from the amended petition that the defendant in error is a street railway company, organized under the laws of

the State of Ohio, owning and operating a system of street railways in the City of Cleveland and its adjacent and contiguous suburbs, and *vested with the right of eminent domain.* It is *the owner by purchase* of six lots in the allotment in question, and plaintiffs are asking that the company be enjoined from using the property for railway purposes. The covenants in the different deeds restricting the use of the lots in the allotment to residence purposes are *not binding upon a corporation possessing the right of eminent domain. Doan* v. *Cleveland Short Line Ry. Co., ante,* 461. The demurrer to the petition was properly sustained, and the judgment of the Court of Appeals is therefore affirmed."

The principle of the cases just cited as proceeding upon the theory that *the act of devoting one's own property to a public use is an exercise of the power of eminent domain* is pointedly emphasized by another decision of the Ohio Supreme Court rendered the same day.

Wallace v. Clifton Land Co., 92 Ohio St., 349, 110 N. E. 940.

In that case lot owners who had purchased lots according to a general plan whereby uniform restrictions were imposed limiting the use of the land to residence purpose sought to enjoin *a real estate company* from devoting some of the lots which it had acquired under the same restrictions to road and street purposes. It was argued for the Land Company that its use of the lots for road and street purposes was a devotion to a public use and "that the public has the right to take private property for public use whenever it becomes necessary, and that no contract can be made that will prevent the state or any body po-

litic or corporate, *having the right of eminent domain,* from appropriated private property to a public use." The court stated that that was a "self-evident proposition" but "it is not the case presented for review." It then said:

> "These *private proprietors* have undertaken to create a public thoroughfare through this addition and over the lands subject to these restrictions. *Public ways cannot be established in this manner.* The need of such thoroughfares is *a question to be determined by the public authorities.* When these authorities have determined the necessities of such ways, private property can be taken for such use, regardless of restrictions or limitations placed upon the same by deed, contract or otherwise, and when established, these ways come under the control of the public authorities, whose duty it is to keep them in repair, free from nuisance and open for public travel. The question whether the owners of other lots in this addition have any property interest in these lots that would require them to be compensated before being taken for public use does not arise in this case.
>
> "It is said in argument that these lots have already been deeded to the City of Lakewood for street purposes, but *no presumption obtains that the city will accept such grant,* for this carries with it burdens of construction, maintenance, care and control that the city authorities may not care to assume.
>
> "The only question presented in this record is the question of the right of The Clifton Land Company to devote these lots, covered by these restrictions, to street purposes, and that question must be answered in the negative."

Thus in those three cases the highest court of the State has determined (1) that a devotion of

property to a public use cannot be accomplished by the act of the owner alone unless he have the power of eminent domain—some public authority must determine the need for the use and accept the devotion; (2) where an owner having the power of eminent domain devotes his property to a public use such devotion is an exercise of that power even though title to the land was acquired by purchase.

The same principle has been recognized in this court. See *California v. Pacific Ry. Co.*, 127 U. S. 1, 40.

It follows, therefore, that the appellees' devotion of the lands in question to a *public use** under color of authority of the franchise of the defendant Northern Ohio Power Company (which franchise was obtained *subsequently* to the grant of the plaintiff's franchise) is an exercise of the power of eminent domain and constitutes *an unlawful taking* of the plaintiff's property right in its perfected location, and hence should be enjoined.

Lewis, Eminent Domain, 3d ed., Sec. 901, 902;
Ohio cases cited at pp. 57, 58, our first brief;
Rochester Railroad case, cited at p. 61;
Denver & Rio Grande case, cited at pp. 61-66.

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* By this we mean a use of a public nature, viz., power-development purposes. And to avoid confusion we repeat that the allegation of private use contained in paragraph Sixteenth of the bill relates to the Taction Company's own lack of the power of eminent domain, and must be read in connection with the other allegations that the franchise of the Northern Ohio Power Company, by the purchase of which the Traction Company sought to supply its own lack of eminent domain power, is null and void as to this plaintiff because subsequent in time and conflicting in location.

IX

Point I of the appellees' brief, pages 10 to 17, is devoted to the proposition that incorporation under the general statutes of Ohio does not constitute a contract or confer any exclusive franchise rights. That manifestly cannot be true unless the *Dartmouth Colllege Case* is to be regarded as overruled. The decision in *Sears v. Akron* cannot be said to have accomplished that result. It is there expressly recognized that "incorporation alone" created some "contract right." See quotation at page 16 of appellees' brief. The question always is as to the *scope* of the contract. And though we have preferred to rest the case at bar principally upon the right acquired by the perfected location rather than upon that acquired by incorporation—*i. e.*, upon the *third* assignment of error rather than upon the *second* (Rec. p. 42)—it seems proper to point out what seem to us to be manifest errrors in the argument set forth in Point I of the appellees' brief.

1. Much stress is laid upon the fact that any grant of corporate powers in Ohio is subject to amendment or appeal. That is immaterial here because the amendment or repeal must be by the General Assembly and it has not acted (See *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574 at p. 584). In this aspect the case at bar differs from *Sears v. Akron*.

2. The appellees, in speaking of the legislation under which the plaintiff was organized, say (Brief, p. 13):

> "These laws authorize the formation of such corporations but make no direct or

definite provisions as to any specific locality in which they are to operate."

The truth is precisely the contrary. Section 8625 of the Ohio General Code expressly provides:

> "If the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth (*a*) the kind of improvement intended to be constructed, (*b*) its termini and the counties in or through which it or its branches will pass."

And in *Callender v. Painsville, &c., R. R. Co.*, 11 Ohio St., 424, it was expressly ruled that that requirement is "*for the purpose of avoiding conflict in prior and subsequent grants of corporate powers.*" The language of the court in that case was as follows:

> "Indeed it will be found, I apprehend, that the rule has been in our past legislation, to have the point of the termini somewhat indefinite in the charter, and that it has only become determinate by an actual location. Nor can I perceive that the language of the statute under consideration intended to change the rule in that regard. It was found convenient, and often necessary, under our special legislation, both for the limitation of the powers to be granted in the charter, AND FOR THE PURPOSE OF AVOIDING CONFLICT IN PRIOR AND SUBSEQUENT GRANTS OF CORPORATE POWERS FOR LIKE PURPOSES, to have reasonable certainty expressed in the charter. *For like reasons, and to secure the same objects, the certificate is required to express with like certainty, as was before expressed in the charter, as well the place of the termini and the counties through which a license to con-*

> *struct is asked,* as the name of the company. *And the certificate when thus made, acknowledged and certified, and recorded by the Secretary of the State, by force of the statute, becomes to the company,* AND TO THIRD PERSONS, *as authoritative a description and license to locate the road in a reasonable compliance with such description, as would the same language expressed in a special act or charter, under our former constitution.*"

3. The appellees further say with reference to corporations formed under the general laws of Ohio:

> "There is no requirement that, having been formed, they shall perform any public service whatever. They are free to carry out the purposes named in their articles, or such part thereof as they may deem advantageous, as they see fit" (Brief, pp. 13, 14).

The truth, as declared by this court and the Supreme Court of Ohio, is just the reverse. In *New York Electric Lines Co. v. Empire City Subway,* 235 U. S. 179, 193, this court expressed the long-established rule as follows:

> "Grants like the one under consideration are not *nude pacts* but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See *The Binghamton Bridge,* 3 Wall., 51, 74; *Pearsall* v. *Great Northern Railway,* 161 U. S. 646, 663, 667. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance."

In *Adena R. R. Co. v. Public Service Commission,* 92 Ohio St. 1, the Supreme Court of Ohio

affirmed an order of the Commission requiring a railroad company which had been *organized under the general laws of the State of Ohio* to provide certain passenger service and facilities, although the company had actually held itself out as a carrier of freight only. In so holding the court said:

> "Having the undoubted power, under its charter, to perform the functions of a common carrier of passengers, it became amenable to the state's control in relation to that specific duty. Its obligations are mutual and correlative. *Since the railroad company under its franchise could insist upon its right to carry passengers, the state could also insist upon the performance of that duty by the carrier with reasonable limits.*
>
> • • • • •
>
> "BY ITS INCORPORATION, UNDER THE GENERAL LAWS, THE CORPORATION ASSUMED THE PERFORMANCE OF DUTIES FOR THE BENEFIT OF THE PUBLIC GENERALLY AS A COMMON CARRIER. *Scofield* v. *The L. S. & M. S. Ry. Co.*, 43 Ohio St., 571; *State* v. *The Hazelton & Leetonia Ry. Co.*, 40 Ohio St., 504; 4 Elliot on Railroads (2 ed.), section 1392.
>
> "That it has held itself out to the public, for a period of time, as a carrier of freight only, does not impinge upon *the right of the state to compel the exercise of its franchise*, if that right existed at the time of the grant and was not affected by subsequent legislation."

In *Hocking Valley Ry. Co. v. Public Utilities Commission*, 92 Ohio St. 9, the Supreme Court of Ohio again affirmed an order requiring the Railway Company to establish and furnish certain passenger service. In so holding, the Court said:

> "It is well established that *the benefits which result to the public constitute the*

> *consideration for the grant* by the state of the franchises, rights and privileges held and exercised by a railroad company, and that *their acceptance by the company imposes on it the obligation* to operate the railroad which it was incorporated to construct, when constructed, and of doing so in the manner and for the purposes contemplated in its charter. One of the obligations thus imposed is to operate its trains that they will reasonbly serve the needs of the public."

The State Court has also approved this statement of the law:

> "It is, of course, well-settled law that a railroad may not render itself incapable of performing its duties to the public or *absolve itself from those obligations* without the consent of the state."
>
> *Kanawha & M. Ry. Co. v. Public Utilities Com.*, 96 Ohio St. 414, 429.

It is thus conclusively settled that by incorporation under the general laws of Ohio a corporation *assumes the obligation of performing the undertaking to which the incorporation relates.* The plaintiff was incorporated under the same general law as that under which railroads are incorporated, and the decisions cited are hence controlling.

4. The appellees say:

> "The filing of articles of incorporation by one set of incorporators would not prevent the incorporation of another company with like purposes, nor would the designation of certain termini or the specification of a certain river in the articles of incorporation of one company preclude the organization thereafter of another company naming the same river for its field of operation" (Brief, p. 14).

Of course the filing of articles by one set of incorporators would not prevent the incorporation of another similar company *in a different location.* But to say that the designation of a location in the articles of one company does not preclude the organization of another company to operate *in that same place,* is to render meaningless the express provision §8625 of the Ohio Code requiring the articles to state the location, and would contradict the ruling made in *Callender v. Painesville &c. R. R. Co, supra,* in which it was said that *the very object of requiring a statement of the location in the articles is for the purpose of avoiding conflict in prior and subsequent grants.*

Indeed, the contention here advanced that a grant of the right to one place to one person does not preclude a second grant of the same right to another person is wholly inconsistent with the fundamental proposition upon which the *Dartmouth College Case* was decided, viz., "a grant, *in its own nature,* amounts to an extinguishment of the right of the grantor and implies a contract not to re-assert the right." The legislature having granted the right to one place to A cannot thereafter grant it to B. To accede to the contention of the appellees, therefore, would in very truth overrule the *Dartmouth College Case* in its entirety. *Fletcher v. Peck,* 6 Cranch, 87, and other landmarks of the law would also fall if the appellee's argument were acceded to.

The doctrine for which the appellees here contend would likewise lead to a manifest practical absurdity. If one set of incorporators may file articles for one location on one day and another set may file articles for the same location on another day, then the first set might refile addition-

al articles on the third day, and there would thus be created interminable confusion, with the result that neither corporation could in any way protect its rights or proceed with its operations.

The appellees themselves admit as much at page 18 of their brief.

5. The appellees say:

> "The incorporators, to give a necessary definiteness to its purposes for indicating what shall be *intra vires* and *ultra vires*, recite in general language where the corporation is to conduct its operations, but these purposes may be enlarged or diminished or wholly unperformed" (Brief, p. 14).

As already pointed out, however, the statutory requirement that the articles of incorporation specify the location is *not* for the mere purpose of defining or limiting corporate powers. It is "for the purpose of avoiding conflict in prior and subsequent grants of corporate powers for like purposes" (*Callender v. Painesville &c. R. R. Co., supra*). As also already pointed out, these purposes may *not* be left "wholly unperformed," for there is an obligation resting upon the company to perform the public service to which the undertaking relates (*N. Y. Electric Lines v. Empire City Subway, supra*; *Adena R. R. Co. v. Public Service Commission, supra*; *Hocking Valley Ry. Co. v. Public Utilities Commission, supra*).

6. The appellees say:

> "It seems to us impossible to read into the general language of this statute any intention of conferring any exclusive rights upon corporations which may be organized under it and there certainly cannot be read

> into this general law the intention to confer any such exclusive rights of the extravagant character claimed by appellant" (Brief, p. 14).

If the legislature did not intend to confer upon corporations organized under these statutes *a right to construct and maintain a plant in the place designated in the articles*—a right that cannot exist unless there be included in it the right to exclude all other persons from the same place —what did it intend? Borrowing the language of this Court in *New York Electric Lines Co. v. Empire City Subway, supra*, the statutes under which the incorporation was effected were

> "intended to afford the basis of enterprise with reciprocal advantages, *and it would be virtually impossible to fulfill the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred,* if, *in the initial stages of the enterprise,* when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the (rights and powers conferred) should be subject to revocation at any time by the authorities—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, *but because as yet no contract whatever had been made and there was nothing but a license which might be withdrawn at pleasure.*"

The sweeping contention in the present case is that the rights conferred by incorporation *do not even amount to a revocable license.* The appellees go far beyond that position and assert that, even prior to any repeal or revocation by the Legislature, the incorporation is so utterly

futile and abortive that it may be ignored by any and every third person. As put at page 14 of their brief, the incorporation, according to the view of the appellees, does not even "preclude the organization thereafter of another company naming the same river for its field of operations."

The practical result of such a doctrine is sufficient to demonstrate its unsoundness. The manifest intent of the legislature in enacting Section 10,128 of the General Code was to provide for the development of hydro-electric power from the waters of the rivers of the state through the instrumentality of incorporated companies, which, as shown by the eloquent language of Mr. Justice Holmes in *Mt. Vernon Cotton Co. v. Alabama Power Co.* 240 U. S. 30, 32, is a great and beneficent public purpose. In order to obtain the rich benefits of such development the legislature conferred upon companies organized for that purpose the right to enter upon, survey, and appropriate the lands and waters necessary to construct and operate the plant (*Ohio Gen. Code*, Sec. 10,128). Could any effective development be secured if, after the incorporation of one company for the development of one river, another set of incorporators might immediately procure the organization of another company "naming the same river for its field of operation"? Manifestly not. Such a construction of the legislation would effectively prevent any development whatever and set the legislative purpose at naught. Public grants, it is true, are to be construed strictly in favor of the public, and ambiguities are to be resolved against the grantee, but "*this principle of construction does not de-*

ny to public offers A FAIR AND REASONABLE INTERPRETATION, *or justify the withholding of that which it satisfactorily appears the grant was intended to convey*" (*Russell v. Sebastian* 233 U. S. 195, 205). The only "fair and reasonable interpretation" of the legislation of Ohio upon this subject is that a company organized for the purpose named in the statute should be endowed with the rights and powers necessary to accomplish the purpose. And to that end it must be held that when one company has perfected a definite location it has a right to that place as against rival companies thereafter attempting to exercise a rival franchise in the same location. That is the claim we assert in this case. Certainly it cannot be deemed an extravagant one.

We do not claim that the plaintiff's charter protects it from *mere competition.* That was the ground of decision in *Charles River Bridge v. Warren Bridge* 11 Pet. 420, which forms the basis of the appellees' quotation from *Pearsall v. Great Northern Ry.* 161 U. S. 646, at page 15 of their brief. In the sense, therefore, that other hydro-electric corporations may be organized under the act under which the plaintiff's incorporation was effected, the plaintiff's franchise, we freely concede, is not exclusive. But in the sense that no other corporation may obtain the right to locate *in the same place* as the plaintiff, its franchise is *obviously* and *necessarily* exclusive.

In the *Charles River Bridge case*, Chief Justice TANEY was careful to point out (p. 549):

> "The relative position of the Warren bridge has already been described. *It does not interrupt the passage over the Charles River bridge, nor make the way to it, or from it, less convenient.* None of the facul-

> ties or franchises granted to that corporation have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property, enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired."

It was *not even contended in that case that the Legislature might have authorized the construction of another bridge in the identical place occupied by the Charles River Bridge.* On the contrary, as pointed out by MR. JUSTICE STORY (pp. 603, 604):

> "*Every grant of a franchise is,* SO FAR AS THAT GRANT EXTENDS, *necessarily exclusive;* and cannot be resumed or interfered with. All the learned judges in the state court (whose judgment was affirmed by this court) admitted that the franchise of Charles River bridge, whatever it be, could not be resumed or interfered with. The legislature could not recall its grant, or destroy it. It is a contract, whose obligation cannot be constitutionally impaired. In this respect, it does not differ from a grant of lands. *In each case, the particular land, or the particular franchise, is withdrawn from the legislative operation.* The identical land, or the identical franchise, cannot be regranted, or avoided by a new grant."

The distinction is well brought out in *Matter of Union Ferry Co.* 98 N. Y. 139, 153-154, in which it was contended that a grant was in conflict with the provision of the Constitution of the State that the Legislature should not pass any private or local bill granting any "exclusive" franchise, because the "designation of the particular piece of property to be condemned for the

purposes of the ferry renders the grant of the privilege or franchise exclusive, inasmuch as no one but the grantee of the power can take the same property." The Court held, however, that this was not "the nature of the exclusiveness contemplated by the Constitution." It said (p. 154):

> "Where a toll-bridge is authorized to be erected at a particular locality, the right to that particular bridge is necessarily exclusive. *So of all lands acquired by a railroad company for depots, car yards, etc., their right to enjoy those lands is exclusive.* The right of the owner of upland to fill out into waters of the State in front of his land is exclusive in respect to the particular property involved, though a similar right may be conferred upon every person owning lands similarly situated."

The distinction was also made the basis of decision by the Supreme Court of Ohio in *Hamilton G. & C. Traction Co. v. Hamilton & L. Electric Transit Co.* 69 Ohio State 402. In that case the grantee of a franchise to construct, maintain and operate a street railroad upon certain streets in the City of Hamilton was successful in enjoining another company from operating a street railroad in the same streets (the tracks of the second company being laid in such manner as to straddle the tracks of the first company) under a second grant from the City. The Court expressly stated that by making the grant to the first company the City *did not exhaust its power or deprive itself of the right to make additional grants for like purposes "in and to the unoccupied portions of the street*;" but it held that so long as the first grant remained in

force the City *could not make a second grant to another company of the right to have and occupy "precisely the same ground or right of way first granted."* It said:

> "To permit this would be to sonction and allow the impairment of the obligation of an existing contract by subsequent municipal legislation or grant. This may not rightfully be done."

The exclusiveness of the plaintiff's franchise (in the sense that it may not be impaired by a third person's use of *the same identical location*) is likewise established by the "conflicting location cases" cited on pages 12-25 of our first brief. The fundamental principle of those cases is that when the grant of a franchise to construct and operate a railroad or other utility between named termini has been *made specific by the adoption of a particular location*, the franchise necessarily becomes exclusive in the sense that, although other railroad companies may be subsequently incorporated to build other railroads, they cannot take or interfere with the location adopted by the first company. As said in one of the cases:

> "That the plaintiff's franchise is exclusive so far as the right to construct a railroad on the line which has been adopted must be conceded, as another road cannot be constructed and operated on the same location; although the statute has not declared in express terms that the privilege is an exclusive one, it would lead to needless contention and disastrous disturbances to hold otherwise and give the statute a different construction."
>
> *Rochester H. & L. Co. v. N. Y. L. E. & W. R. R. Co.* 44 Hun 206; 110 N. Y. 128.

X

At page 46 of the appellees' brief (next to last paragraph) there is the distinct, unqualified and deliberate admission that the parcels of land set forth in the bill are "plainly recoverable" by the plaintiff by means of a condemnation proceeding "if the facts set forth in its bill are true." And by way of emphasis there is added the statement that "upon the averments of the bill it is not possible to imagine why the plaintiff is dodging the direct and open road which all this time has lain before it"—*i. e.*, acquire the land by condemnation.

By their motion to dismiss the appellees admitted the truth of the facts set forth in the bill, and upon this appeal their truth must be conclusively presumed.

The plaintiff, then, according to the appellees' own statement, is clearly entitled to acquire the lands upon assessing and paying the owner's compensation. Yet, we find, from other allegations of the bill—all admitted to be true—that outside of this Court the appellees are asserting just the contrary (Bill, paragraph Seventeenth, Rec. pp. 9, 10) and are asserting their alleged devotion of the land to a public use as a bar to the plaintiff's right to acquire it.

Can there be any reason, then—inasmuch as the appellees here admit both the truth of the facts alleged and the legal conclusion that upon those facts the land is "plainly recoverable" by the plaintiff—why the appellees should not be enjoined from elsewhere denying the plaintiff's rights?

If the admission above mentioned had been made simply by way of argument, we would pay slight attention to it. But as it clearly deliberate and intentional, it is of the utmost importance and should be accepted and acted upon by this Court.

It leads directly to the conclusion that the plaintiff has a legal right to acquire the land in question but is prevented from so doing because of the appellees' use of the same and their wrongful assertion that their use is a bar to the plaintiff's acquisition of the lands. No remedy is available to the plaintiff save its appeal to this Court, and hence the decree should be reversed and the bill sustained.

Respectfully submitted,

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Counsel for Appellant.

March, 1920.

THE ARTHUR H. CRIST CO., COOPERSTOWN, N. Y.
New York Office, 220 Broadway

PLEADINGS AND JUDGMENT IN OHIO SOUTHERN R. R. CO. V. CINCINNATI, H. & D. R. R. CO., DECIDED BY JACKSON COUNTY COMMON PLEAS, 1893.

(a) Petition, Filed March 22, 1893.

State of Ohio, } ss.:
Jackson County, }

Court of Common Pleas.

THE OHIO SOUTHERN RAILROAD COMPANY,
Plaintiff,
v.
THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, M. D. WOODFORD, J. E. GIMPERLING, C. NEILSON, W. L. KING, SIMON GILLIVAN, JAMES BURNS, TIMOTHY LARRY, and S. B. FLOETER,
Defendants.
} Petition

The plaintiff says that it is a corporation duly incorporated under the laws of the State of Ohio, and is operating a railroad between the City of Springfield in Clarke County, Ohio, and the City of Wellston in Jackson County, Ohio; that the defendant, the Cincinnati, Hamilton and Dayton Railroad Company is a corporation incorporated under the laws of Ohio, and is lessee of and as such

lessee, controls and operates the Cincinnati, Dayton and Ironton Railroad, which runs from the City of Dayton, in the County of Montgomery, through the Counties of Greene, Fayette, Ross and Jackson, to a point in Lawrence County, Ohio; that said other defendants are officers and employees of the said the C. H. & D. R. R. Co.; said M. D. Woodford being the President thereof and its General Manager; said J. E. Gimperling being the superintendent of that portion of its line from Dayton to Wellston, Ohio; said C. Neilson being general superintendent thereof; said W. L. King being roadmaster thereof; said defendants Gillivan, Burns and Larry being section bosses thereof; and said Floeter being a trainmaster thereof.

Plaintiff is engaged in constructing its road having full and complete authority in the premises so to do, conferred upon it by law and by its stockholders, Directors and officers and is so engaged in constructing its road as aforesaid, by virtue of a resolution of its stockholders and certificate made in pursuance thereof, and having full power and performed all the things and acts required by law in the premises, authorizing the proper officers of plaintiff to extend its said railroad and is so extending the same from Jackson County, Ohio, up Horse Creed Branch to the city (formerly village) of Wellston, Ohio; thence to Lincoln Furnace, Jackson County, Ohio; thence to Cambell station on the (then) Ohio & West Virginia Railroad in Vinton County, Ohio; that said plaintiff is now engaged in constructing its said extension, and in order to do so, its line of road has been located in and over certain streets and alleys of the said City of Wellston, hereinafter mentioned; that on the

day of December, 1892, and frequently since,

the plaintiff applied to the officers having authority and control over said streets and alleys, for right of way thereover on its located line hereafter designated and described, and being in the City of Wellston, Jackson County, Ohio, to wit:

Across Foster road at the Nail Mill, thence along the west side of Railroad Avenue along the west side of the C. H. & D. R. R. tracks, from their intersection with said Foster Road to 2nd Street, crossing all streets and alleys intersecting said Railroad Avenue or said C. H. & D. R. R. between said Foster Road and said 2nd Street; thence across said 2nd Street commencing at a point nearly opposite the alley between Lots 760 and 758 across the alley between Lots 757 and 758 and Lots 699 and 700; thence across 1st Street at or near the intersection of said 1st Street with Indiana Avenue; thence along Indiana Avenue on the west side of the C. H. & D. R. R. the entire length thereof commencing at the south line of said 1st Street, thence running northerly crossing all streets and alleys intersecting said avenue north of said 1st Street, thence in a northeasterly direction crossing the right of way heretofore granted to Harvey Wells, and assigns for street and belt railroad, thence still in a northeasterly direction crossing the street known as Wellston and Hamden Road, thence still in a northeasterly direction crossing Park Avenue of said city and also across the right of way granted to Harvey Wells and assigns for said street and belt railroad; and which right of way above set forth has been surveyed, located and staked as herein stated. No grant of a right of way or agreement for the use of said streets and alleys has been made and said city, through its

proper authorities, and this plaintiff, have been unable to and cannot agree upon the manner, terms and conditions by which said streets and alleys may be occupied as aforesaid.

On the 18th day of February, 1893, after its inability to agree with said city or its officers, plaintiff filed its petition in the Probate Court of Jackson County, Ohio, asking for the appropriation of so much of said streets and alleys for said Lot 3, as was necessary for plaintiff's use for railroad purposes—a strip 18 feet in width along the line and location above set forth. Plaintiff says that its line of railroad, to be extended as aforesaid, has long been located over said streets and alleys, and premises described and also shown by the plat hereto attached; that said location has been marked and designated by stakes placed 100 feet apart, and numbered from (0) to (140), along the route of plaintiff's railroad over the streets and alleys as designated herein; and the location and survey, and the designating marks of said location has been laid out on the east end of Lot 3 of Lasleys Lots in said City of Wellston; and the said plaintiff has endeavored, to agree with the owner of said strip for a right of way thereon, but has been unable to do so.

Plaintiff brought a suit in condemnation against the said City of Wellston and others to condemn a right of way on said located line, and the preliminary hearing was had and said plaintiff in said preliminary hearing by virtue of the findings of said Court proceeded in the condemnation of said city's rights in the streets and alleys thereof in which cause a jury was impanelled and the cause is now being heard in said Probate Court. The

defendant Railroad Company knowing of all the facts in this petition set forth, and having actual knowledge of plaintiff's location and survey, or, and for the sole purpose of hindering plaintiffs in its attempt to condemn, and with fraudulent intent, has obtained possession of said strip of said Lot 3, Lasley's lot with such knowledge, and with such fraudulent purpose, and are now engaged in constructing a switch thereon and upon and over plaintiff's location to the great and irreparable injury of this plaintiff, and which cannot be compensated in damages. And plaintiff has bought under the statute, adjoining premises to said Lot 3, and has agreed with the owners of various property along its right of way herein, upon the compensation terms, and manners of its occupation by plaintiffs. The defendant Railroad Company, its officers and servants herein named, with full knowledge of the location and designation of plaintiff's line of railroad as above stated, without any right so to do, and without appropriating or instituting any proceedings to appropriate the same to its, said defendant corporation's use, but for the purpose of interfering with the rights of plaintiff and the condemnation proceedings by it brought, and for the purpose of preventing plaintiff from obtaining the right to use and occupy the above premises for its purposes as aforesaid over its said location, and for the purpose of monopolizing the carrying trade and preventing full competition as common carriers in and through said part of said city, and for the purpose of acquiring for itself, without authority or proceedings, the premises easements in and over said streets and alleys upon which plaintiff's said line has been located, are about to and, threaten to, and unless

restrained by said Court, will take forcible possession of said premises and plaintiff's said located line, disturb the survey and designating marks thereof made by plaintiff in pursuance of the laws of Ohio, and will lay its tracks and construct its said defendant corporation railroad upon plaintiff's said located line of railroad, and will interfere with plaintiff's proceedings for the appropriation of the same in said Probate Court, and prevent plaintiff's use and occupancy of same. Said acts of the defendants, and threatened acts as above set forth, will be continuing injury to the plaintiff for which it has no adequate remedy at law, and will prevent the construction of its railroad on said premises, and interfere with plaintiff's pending suit aforesaid to appropriate the same to its said uses. Wherefore plaintiff prays that the defendants, together with all the officers of the said defendant corporation, and its servants and agents, acting under its authority or in its behalf may be temporarily restrained, and that on the final hearing hereof, they may be perpetually enjoined from disturbing the survey, location and the designating marks thereon and from laying its tracks and constructing a railroad over the premises herein named and designated, and from doing any of the acts herein complained of, and for such other and further relief as equity or the nature of the case may require.

H. T. MATHERS and
T. A. JONES,
Attorneys for the
Ohio Southern Railroad Co.,
Plaintiff.

The State of Ohio,}
Jackson County, } ss.:

T. A. Jones, being duly sworn, says that plaintiff in the above action is a corporation duly incorporated under the laws of the State of Ohio, and that he is its attorney duly authorized herein and that the facts stated in the foregoing petition of plaintiff are true.

T. A. JONES.

Sworn to before me, and subscribed in my presence this 22nd day of March, 1893.

T. J. WILLIAMS, Clerk,
by E. P. Williams, Dep.

Certificate.

The State of Ohio,}
Jackson County, } ss.:

I, Glen Roush, Clerk of the Common Pleas Court, within and for said County, having the custody of the files, journals and records of said Court, do hereby certify that the foregoing is a true and correct copy of the original petition now on file in this office.

In witness whereof, I have hereunto set my hand and affixed the seal of said [SEAL.] Court, at Jackson, Ohio, this 27th day of September, A. D. 1915.

GLEN ROUSH,
Clerk of Courts.

(b) Answer and Cross Petition, Filed May 18, 1893.

COURT OF COMMON PLEAS,

JACKSON COUNTY, OHIO.

THE OHIO SOUTHERN RAILROAD COMPANY, Plaintiff, *v.* THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY *et al.*, Defendants.	Answer and Cross Petition of the C. H. & D. R. R. Co.

First Defense:

And now comes The Cincinnati, Hamilton and Dayton Railroad Company, one of said defendants, and for its separate answer to petition of plaintiff says: That it admits its corporate capacity and the corporate capacity of plaintiff, and that it is lessee and as such controls and operates the Cincinnati, Dayton and Ironton Railroad, which extends from the City of Dayton to the Village of Dean in Lawrence County, Ohio, and to and into the City of Wellston, in the County of Jackson and State of Ohio. It admits that M. D. Woodford is its President; that C. Neilson, is its General Superintendent, and that J. E. Gimperling is the Division Superintendent of the Cincinnati, Dayton and Ironton Railroad; that W. L. King is the Road Supervisor of the Cincinnati,

Dayton and Ironton Railroad; that S. B. Floeter is Train Master of said division, and that the other parties named are section men on said division. As to whether or not the plaintiff is authorized in the manner alleged in its petition, or in any other way, to construct a railroad between the points named in the petition and along the line stated, this defendant does not know and has not the means of knowing and therefore it denies the same. It admits that on the 18th day of February, 1893, that said plaintiff filed its petition in the Probate Court of Jackson County, Ohio, asking for the appropriation of certain parts of certain streets and alleys in the City of Wellston, for railroad purposes, but it denies each and every other allegation therein contained.

Second Defense and Cross Bill:

Defendant for a second and further defense, and by way of cross bill to petition of plaintiff, says: That the Cincinnati, Dayton and Ironton Railroad Company is a corporation duly incorporated under the laws of the State of Ohio, and that as such corporation it owns the railroad, right of way, etc., extending from the City of Dayton in Montgomery County, Ohio, to Dean in the County of Lawrence in said State, and also to and into the City of Wellston, in said County of Jackson. That that part of said railroad extending from the said City of Dayton, through the several counties, and to and into the said City of Wellston, in said County of Jackson, and State of Ohio, was originally located and constructed by the "Dayton and South-Eastern Railroad Company," and the tracks of its said railroad were completed to and into the City of Wellston in

June, 1880, and that the Cincinnati, Dayton and Ironton Railroad Company, is the successor, by legal proceeding and purchase of the said Dayton and South-Eastern Railroad. Plaintiff further says that it and its predecessors expended large sums of money and went to a great expense to secure the right of way, in and through the City of Wellston, and to locate, construct and maintain its main track and side tracks thereon and thereover, and that the same are necessary, in order to enable it to transact its business and to do business with the public, and that any interference therewith by having any railroad track, or other superstruction, constructed on or along the said right of way and tracks of the said railroad, through said City of Wellston, and within 18 feet west of the center of its main track, would, for all practical purposes defeat the object of this defendant and the said, The Cincinnati, Dayton and Ironton Railroad Company, in securing the said right of way and building and maintaining its tracks thereon, and that the public would be shut off from getting to its tracks or doing business with it on or along its said tracks, and side tracks in the said City of Wellston, between 11th Street, or what is known as Fosters Road, and from there north to the point where its said tracks leave Indiana Avenue, in said City of Wellston, going towards and to Wellston Mine, No. 3.

The defendant further says: That for a long time previous to the 22nd day of March, A. D. 1893, for the purpose of widening its right of way on the west side of the tracks of the Cincinnati, Dayton and Ironton Railroad, in and through the City of Wellston, between the said 11th Street or Foster Road, and said Second

Street, it had been negotiating for 25 feet of additional right of way, on the west side thereof, and that previous to said 22nd day of March, 1893, it had agreed with one T. M. Cheuvront for the purchase of 25 feet off of the east end of Lot No. 3, of what is known as Lasley's lots or Lasley's addition to the City of Wellston, and that on the 22nd day of March, 1893, the said Cheuvront, by a good and sufficient warrantee deed, conveyed the said 25 feet off of the east end of said Lot No. 3, to this defendant and this defendant paid him the full consideration therefor, and before that time and by and with the consent of Cheuvront, it had entered into the possession thereof, and has ever since and still does own, control and possess the same. This defendant further says, that the said plaintiff is threatening to locate and construct its railroad on and across this part of said Lot No. 3, so owned and possessed by this defendant, and if not restrained by this Court will unlawfully and forceably take possession of the same, without any right or authority so to do, and will then and thereby take possession of that part of the right of way and also of the property of this defendant in said City of Wellston, without any right whatsoever so to do, and thereby do great and irreparable injury to this defendant and to the property of its lessor, the Cincinnati, Dayton and Ironton Railroad Company.

This defendant therefore asks that the said plaintiff, The Ohio Southern Railroad Company, may be temporarily enjoined from encroaching upon or entering upon the right of way of the said Cincinnati, Dayton and Ironton Railroad Company, now leased and operated by this defendant, and also that it may be temporarily enjoined from

entering upon, disturbing, locating or attempting to locate, construct, or attempting to construct its railroad or tracks, or any part thereof, upon any of the property or rights of way of the said The Cincinnati, Dayton and Ironton Railroad Company, in or through the said City of Wellston, and also that it may be enjoined from entering upon, constructing or attempting to construct its railroad or tracks or any part thereof upon that part of said Lot No. 3, owned and occupied by this defendant and that upon the final hearing hereof the said injunction may be made perpetual and for such other and further relief as equity and justice may require.

R. D. MARSHALL,
M. T. VANPELT,
Attorneys for Defendant.

The State of Ohio,}
Montgomery County,} ss.:

J. E. Gimperling, being first duly sworn, deposes and says: That the defendant in the foregoing action is a corporation duly incorporated under the laws of Ohio, and that he is one of its agents, duly authorized, and that the facts stated and allegations made in the foregoing answer and cross bill of defendant, are true.

J. E. GIMPERLING.

Sworn to before me by J. E. Gimperling}
and by him subscribed in my presence}
this 27th day of April, A. D. 1893. }

A. McL. Marshall,
[SEAL.] Notary Public,
Montgomery County, Ohio.

Certificate.

The State of Ohio, }
Jackson County, } ss.:

I, Glen Roush, Clerk of the Common Pleas Court, within and for said County, having the custody of the files, journals and records of said Court, do hereby certify that the foregoing is a true and correct copy of the original answer and cross petition now on file in this office.

In witness whereof, I have hereunto set my hand and affixed the seal of said [SEAL.] Court, of Jackson, Ohio, this 27th day of September, A. D. 1915.

GLEN ROUSH,
Clerk of Courts.

(c) Demurrer, Filed June 3, 1893.

State of Ohio, }
Jackson County, } ss.:

COURT OF COMMON PLEAS,

THE OHIO SOUTHERN RAILROAD COMPANY,
Plaintiff,
v.
THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY,
Defendant.

Plaintiff demurs to the answer and cross peti-

tion, and to the first and second defenses therein contained and for demurrer says:

That said answer and cross petition does not, nor does either of the said defenses therein state facts sufficient to constitute a defense, or defenses to plaintiff's petition, or entitle defendant to the relief asked in the cross petition of defendant.

H. T. MATHERS and
T. A. JONES,
Attorneys for Plaintiff.

Certificate.

The State of Ohio, }
Jackson County, } ss.:

I, Glen Roush, Clerk of the Common Pleas Court, within and for said County, having the custody of the files, journals and records of said Court, do hereby certify that the foregoing is a true and correct copy of the original demurrer now on file in this office.

In witness whereof, I have hereunto set my hand and affixed the seal of said
[SEAL.] Court, at Jackson, Ohio, this 27th day of September, A. D. 1915.

GLEN ROUSH,
Clerk of Courts.

(d) Reply, Filed June 21, 1893.

State of Ohio, }
Jackson County, } ss.:

COURT OF COMMON PLEAS,

THE OHIO SOUTHERN RAILROAD COMPANY,
Plaintiff,
v.
THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY *et al.*,
Defendants.

Now comes the plaintiff, by leave of this Court, and for reply to the answer and cross-petition of the defendant, the Cincinnati, Hamilton and Dayton Railroad Company, says:

That it admits that the said defendant has a track running through the City of Wellston, and that it owns a small amount of territory in said city which it is using for track purposes, but the said plaintiff says that its location as set forth in the petition does not encroach upon the territory or property rights of said corporation defendant; plaintiff denies that said corporation defendant has any right, title or interest in any part of the premises described in the petition other than said defendant claims to have a deed for certain premises known originally as Lot 3 of Lasley's outlots in said City of Wellston; plaintiff says that if said railroad corporation procured a deed for said

premises, that the same has not been placed on record, that said defendant railroad company procured the same in fraud of plaintiff's rights; that the line of location of plaintiff's railroad had before been surveyed, and located over the premises in controversy, and that the location had been marked and designated by stakes placed in the earth 100 feet apart, and consecutively numbered; that said location so surveyed and designated, passed over the premises named in the petition and over the said lot known as lot 3 of Lasley's outlots; that said plaintiff railroad had, throughout the City of Wellston, procured deeds for its said right of way and had expended large sums of money in procuring the same; that only three or four persons remained to be negotiated for from said 2nd street to said Foster's road in said city, and that plaintiff had procured and paid for the lands and lots contiguous to said Lot 3, and was proceeding to condemn said premises to its uses, when the said railroad defendant, well knowing that plaintiff had located its line as aforesaid, and that it had expended large sums of money in procuring its right of way, and for the sole purpose of fraudulently hindering the plaintiff from acquiring a right of way over its said located line, thrust or attempted to thrust a switch over the premises aforesaid; plaintiff says that it had brought proceedings in condemnation in the Probate of said County, in which it sought to condemn the rights of said City of Wellston in the premises described in the petition and in the premises herein described and called Lot 3, and which was dedicated to the public; that all of the preliminary questions had been heard by said Probate Court and decided in favor of plaintiff and a

jury empanelled in said Court, and on the day that said Court had appointed to try the questions of damages, the said railroad company, well knowing of the proceedings in condemnation, and having actual notice that the line of plaintiff had been located as herein stated, and that large purchases had been made for its right of way through said city, and also knowing that the plaintiff company was proceeding to condemn as aforesaid and that said proceedings were pending to condemn the premises in controversy, attempted to thrust a switch over the location of plaintiff which it was procuring as aforesaid. Said switch was attempted to be laid, for the sole purpose of rendering the right of way and location of plaintiff useless to plaintiff, and tended to make the proceedings in appropriation in said Probate Court of no force and effect; plaintiff says that it now has and holds possession of the premises by virtue of its appropriation to its uses in said Probate Court, and said switch was attempted to be laid laterally for some distance over the located line of plaintiff; and the same was not and from its nature could not be, of any practical value to the defendant corporation. Plaintiff says that if said switch was permitted to stand on the located line of plaintiff's right of way, that the rights procured and right of way bought by plaintiff and such as have been by it condemned for its uses, would be of no value to plaintiff and the plaintiff would not have any line of its own into the said City of Wellston; that the located line named in the petition is the only practical way into the central part of said city. Plaintiff denies that said defendant corporation has any franchises in said city other than its track rights

through a portion of its streets; denies that it has any property of rights in the premises named in, and denies that plaintiff will in any way, interfere with any franchise that said defendant has, or in any way encroach upon its property other than at a crossing point, where the plaintiff does not propose to cross without first acquiring the right to do so. And plaintiff denies each and every allegation contained in said answer and cross-petition inconsistent with the allegations herein contained.

Wherefore plaintiff insists upon the relief prayed for in its petition.

H. T. MATHERS and
T. A. JONES,
Attorneys for Plaintiff.

State of Ohio, }
Jackson County, } ss.:

T. A. Jones, being duly sworn, says that he is the attorney of the plaintiff, a corporation organized under the laws of the said State, and that he believes the facts contained in the foregoing reply, are true.

T. A. JONES.

Sworn to before me, and subscribed in my presence, this June 21, A. D. 1893.

T. J. Williams,
Clerk of Courts.

Certificate.

The State of Ohio,
Jackson County, } ss.:

I, Glen Roush, Clerk of the Common Pleas Court, within and for said County, having the custody of the files, journals and records of said Court, do hereby certify that the foregoing is a true and correct copy of the original reply now on file in this office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Jackson, Ohio, this 27th day of September, A. D. 1915.

[SEAL.]

GLEN ROUSH,
Clerk of Courts.

(e) Judgment.

COMMON PLEAS COURT,

JACKSON COUNTY, OHIO.

May Term, A. D. 1893.

THE OHIO SOUTHERN RAILROAD COMPANY, Plaintiff, *v.* THE CINCINNATI, HAMILTON AND DAYTON R. R. Co., Defendant.	Equitable Relief.

And now comes the above named parties by

their attorneys, and thereupon this action came on for trial before the Court upon the issues joined between the parties.

On consideration whereof the Court finds the facts set forth in the petition of plaintiff to be true, in manner and form as the said plaintiff has in its said petition alleged against said defendant. It is therefore ordered and adjudged that the injunction heretofore granted in this action be and the same is hereby made perpetual, and that the said defendants are hereby perpetually enjoined from disturbing the survey location and designating marks thereon, and from laying its tracks and constructing a railroad upon the premises named in petition of plaintiff, and from doing any of the acts complained of in the said petition, and it is further considered that the said plaintiff recover against the said defendant its costs in and about its suit in this behalf expended, taxed to dollars.

And thereupon came the said The Cincinnati, Hamilton and Dayton Railroad Company and gave notice of its intention to appeal from so much of said judgment as affects it, and its rights and property, and on the motion of said The Cincinnati, Hamilton and Dayton Railroad Company, its said appeal is allowed on its giving bond in the sum of five hundred dollars ($500.00) conditional to pay all moneys, costs and damages which may be required of or awarded against the said The Cincinnati, Hamilton and Dayton Railroad Company, by the said Court.

The State of Ohio, }
Jackson County, }ss.:
Common Pleas Court, }

I, the undersigned, Clerk of the Court of Common Pleas, within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the Journal of the proceedings of said Court; that it has been compared by me with the original entry on said Journal, and that the same is a true and correct copy thereof.

In testimony whereof, I hereunto subscribe my name officially, and affix the seal of said County, at the Court House, in Jackson in said County, this 27th day of September, 1915.

GLEN ROUSH,
Clerk of said Court of Common Pleas.

Certificate.

The State of Ohio, }
Jackson County, }ss.:

I, Glen Roush, Clerk of the Common Pleas Court and the Court of Appeals (Formerly the Circuit), within and for said County, having the custody of the Files, Journals and Records of said Courts, do hereby certify that Cause No. 4396, The Ohio Southern Railroad Company, plaintiff, against The Cincinnati, Hamilton and Dayton Railroad Company *et al.*, defendants, was taken from the Common Pleas Court to the Circuit Court

of said County, on error, and was there dismissed for want of prosecution, as the records in this office will disclose.

In testimony whereof, I have hereunto set my hand and affixed the seal of said [SEAL.] Court, at Jackson, Ohio, this 27th day of September, A. D. 1915.

GLEN ROUSH,
Clerk of Courts.